

UNITED STATES DISTRICT COURT  
DISTRICT OF PUERTO RICO

LUIS CABRERA,

Plaintiff,

Civil No. 08-1325 (JAF)

V.

SEARS ROEBUCK DE PUERTO RICO,  
INC., et al.,

## Defendants.

## **OPINION AND ORDER**

Plaintiff Luis Cabrera brings this action against Defendants Sears Roebuck de Puerto Rico Inc. ("Sears") and Sears Holding Group alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and Act No. 44, of July 2, 1985, 1 L.P.R.A. § 501-511b (2008) ("Law 44"); Act No. 115, of December 20, 1991, 29 L.P.R.A. § 194-194b (2001) ("Law 115"); and Act No. 80, of May 30, 1976, 29 L.P.R.A. § 185a-185m (2001 & Supp. 2007) ("Law 80"), under Puerto Rico law. (Docket No. 12.) Defendants move for summary judgment. (Docket No. 29.) Plaintiff opposes (Docket No. 40), Defendants reply (Docket No. 50), and Plaintiff surreplies (Docket No. 54).

Civil No. 08-1325 (JAF)

-2-

1                   **I.**2                   **Factual and Procedural Synopsis**3                 We derive the following facts from the parties' motions,  
4                 statements of uncontested facts, and exhibits. (Docket Nos. 29,  
5                 30, 35, 38, 40, 49, 50, 53, 54, 60.)6                 Plaintiff began working at Sears on December 14, 1999, as a  
7                 materials handler in the Sears Retail and Distribution Center  
8                 ("RDC") in Cupey, Puerto Rico. From 2003 to 2006, Plaintiff  
9                 operated a cherry picker machine in a RDC warehouse picking and  
10                retrieving stocked merchandise. This required Plaintiff to lift  
11                himself up to fifteen-and-a-half feet in the air with the machine  
12                to take merchandise off the warehouse shelves.13                During Plaintiff's employment, Sears had a code of business  
14                conduct and a workplace policy prohibiting violence and threats.  
15                Sears issued notices to Plaintiff several times during his  
16                employment for alleged violations of the policy.17                On October 23, 2001, Plaintiff received an Ethics/Policy  
18                Violation Notice from a supervisor regarding an incident on  
19                August 29, 2001, with a co-worker, Iván Molina. The notice  
20                provides no details of the incident. Sears later terminated  
21                Molina's employment.

Civil No. 08-1325 (JAF)

-3-

1                   On April 11, 2006, RDC Operations Manager Gregory Rivera and  
2 District Logistics Manager Abner Román met with Plaintiff and a  
3 co-worker to discuss an incident that had occurred between them  
4 on February 9, 2006. The nature of the incident is not documented  
5 and is disputed by the parties.

6                   In February 2006, Dr. Evelio Bravo Fernández ("Bravo")  
7 diagnosed Plaintiff with Hepatitis C. On May 4, 2006, Plaintiff  
8 verbally requested reassignment to another position due to  
9 anticipated physical and emotional changes resulting from a  
10 medical treatment he was about to begin. On May 9, 2006, Bravo  
11 submitted a Health Care Provider Certification ("HCPC") to Sears  
12 stating that Plaintiff was limited in his ability to perform  
13 manual tasks, specifically heavy lifting, exposure to heights,  
14 and use of stairs. Bravo indicated that the expected duration of  
15 the treatment would be forty-eight to fifty weeks, and that  
16 Plaintiff would require reassignment to another position and a  
17 modified work schedule. Bravo also checked "yes" in response to  
18 the question, "Do you believe your patient poses an imminent and  
19 substantial degree of risk to [his] health or safety or to the  
20 health and safety of others if [he] worked in the described  
21 position?" (hereinafter the "risk assessment question"). Bravo  
22 explained that Plaintiff "[m]ay fall or get accident prone."

Civil No. 08-1325 (JAF)

-4-

1 (Docket No. 29-20.) Prior to beginning treatment, Plaintiff was  
2 asymptomatic and able to perform the essential functions of his  
3 job without limitation.

4 Plaintiff began treatment on May 26, 2006; he took a leave  
5 of absence around this time for three to four weeks. As a result  
6 of the treatment, Plaintiff suffered muscular pain,  
7 cerebrovascular problems, diarrhea, stomach problems, dizziness,  
8 depression, hair loss, weight loss, irritability, fatigue,  
9 anemia, insomnia, memory loss, difficulty with coordination of  
10 movement, and weakness. Upon his return to work, Sears assigned  
11 Plaintiff to stock merchandise using a Hyster machine, which did  
12 not expose Plaintiff to heights or heavy lifting and allowed him  
13 to remain seated.

14 On August 29, 2006, Sears issued a Documentation of  
15 Performance Issues ("DPI"), which described an incident in June  
16 2006 between Plaintiff and his supervisor Miguel Paca, during  
17 which Plaintiff allegedly threatened Paca and used obscene  
18 language. The document advised Plaintiff that it was not the  
19 first time he had been involved in an argument or altercation at  
20 work. Plaintiff denies that the incident occurred.

21 In December 2006, Plaintiff filed a complaint with Puerto  
22 Rico's Occupational Safety and Health Administration ("PROSHA")

Civil No. 08-1325 (JAF)

-5-

1 to report safety concerns at Sears. On December 14, 2006, PROSHA  
2 sent Sears a letter regarding the situation; the letter did not  
3 identify the complainant. PROSHA later notified Plaintiff that  
4 Sears had resolved the safety concerns.

5 On January 4, 2007, Plaintiff received a DPI notifying him  
6 that on November 30, 2006, he had violated the workplace violence  
7 policy by engaging in a verbal altercation with a co-worker in  
8 front of other co-workers. Plaintiff noted on the form that he  
9 had reported the incident on November 30, 2006. Plaintiff's  
10 earlier report stated that the co-worker had instigated the  
11 incident and threatened Plaintiff.

12 In April or May 2007, Bravo informed Plaintiff that the  
13 treatment had not been successful and would need to continue. On  
14 May 8, 2007, Plaintiff submitted another HCPC from Bravo  
15 requesting accommodations. The form reported limitations in  
16 Plaintiff's ability to perform manual tasks, specifically heavy  
17 lifting, exposure to heights, and using stairs. Bravo indicated  
18 that he expected the condition to last forty-eight weeks, and  
19 that Plaintiff required reassignment to another position and a  
20 modified work schedule that did not require work on Saturdays.  
21 Bravo again checked "yes" in response to the risk assessment  
22 question and noted that Plaintiff "[m]ay fall or get accident

Civil No. 08-1325 (JAF)

-6-

1 prone. Emotional liability [second] to his treatment." (Docket  
2 No. 29-28.)

3                   Associate Relations Manager Sunny González contacted Sears'  
4 Accommodation Help Desk in Chicago on May 25, 2007, for  
5 assistance in handling Plaintiff's request for accommodation. On  
6 March 31, 2007, Román and Human Resources Specialist Jennifer  
7 Vega spoke with Jean Barlett, Sears' fair employment and  
8 accommodation consultant, who directed them to ask Plaintiff's  
9 doctor whether Plaintiff could continue working with the  
10 accommodations he had already been given. If the information was  
11 unclear, Sears would hire an independent doctor, and would put  
12 Plaintiff on leave for the duration of his treatment if he could  
13 not work in any available position. On June 28, 2007, González  
14 requested that Plaintiff submit additional medical information  
15 in order to evaluate his request for reasonable accommodation.  
16 The same day, González sent an email with a Performance Plan for  
17 Improvement to Román to discuss with Plaintiff, and stated that  
18 "we understand that this is not the time to fire him." (Docket  
19 No. 53-11.) González asked Román to explain to Plaintiff that  
20 this would be his last chance.

21                   On June 15, 2007, PROSHA again notified Sears that it had  
22 received a notice of an alleged health and safety risk,

Civil No. 08-1325 (JAF)

-7-

1 specifically that the batteries of their lifts were defective and  
2 released acid and smells that affected employees; the notice did  
3 not identify the complainant. On June 27, 2007, Plaintiff  
4 complained to Vega that the Hyster machine's battery was leaking  
5 acid and emitting a strong odor. Vega and others later visited  
6 the machine but discovered no odor.

7 On July 3, 2007, PROSHA wrote to Plaintiff acknowledging a  
8 complaint he had filed about safety concerns at Sears. The same  
9 day, PROSHA wrote to Román informing him of a complaint of  
10 stagnant water and defective ramps at Sears; the letter did not  
11 identify the complainant.

12 On July 4, 2007, Plaintiff received another DPI listing  
13 seven occasions on which he had been disrespectful or threatening  
14 toward supervisors or coworkers, including a June 27, 2007,  
15 incident in which Plaintiff allegedly yelled at Vega and other  
16 supervisors in front of coworkers.

17 Plaintiff submitted a third HCPC from Bravo on July 10,  
18 2007. Bravo stated that Plaintiff had been diagnosed with  
19 depression and anemia, was limited in several major life  
20 activities, and suffered from insomnia, loss of memory, muscle  
21 pain, irritability, and lack of stamina and strength. He wrote  
22 that he expected the condition to last seventy-two weeks and that

Civil No. 08-1325 (JAF)

-8-

1 Plaintiff could not perform heavy lifting or be exposed to  
2 heights. Bravo clarified in response to the risk assessment  
3 question that Plaintiff was at risk for "trauma due to falls and  
4 could get hurt or have accident[s] due to his weakness. He is not  
5 a risk to the health of others." (Docket No. 29-34.)

6 González, Vega, and Román met with Plaintiff on July 24,  
7 2007. At the meeting, Plaintiff executed a medical release so  
8 Sears could speak directly with his doctors regarding his  
9 limitations and required accommodations. The supervisors also  
10 informed Plaintiff that he would be suspended from work pending  
11 clarification of the information in the HCPC. During the  
12 suspension, Plaintiff received short-term disability payments of  
13 seventy percent of his salary.

14 On July 30, 2007, González spoke by telephone with Bravo,  
15 who confirmed that Plaintiff could do his job with the provided  
16 accommodations, that he would simply have to work more slowly and  
17 carefully due to his weakness and lack of agility, that his  
18 irritability and aggressiveness were a result of the treatment  
19 but that it was not likely to rise to the level of violence, and  
20 that the treatment would last at most five to six months more.  
21 Bravo also stated that he had referred Plaintiff to a  
22 psychiatrist to deal with his changes in mood.

Civil No. 08-1325 (JAF)

-9-

1           At González' request, Plaintiff executed a medical release  
2 form for her to speak with his psychiatrist, Dr. Brignoni  
3 ("Brignoni"), on August 2, 2007. On August 6, 2007, Plaintiff  
4 brought González a letter from Brignoni certifying that  
5 Plaintiff's emotional condition was stable and did not prevent  
6 or interfere with his work, but she did not accept the letter.  
7 Later that day, González spoke by telephone with Brignoni, who  
8 stated that he would not comment until González put Sears'  
9 specific concerns in writing. On August 9, 2007, González sent  
10 Brignoni a five-page letter detailing Plaintiff's alleged  
11 problems at work.

12           On August 14, 2007, Sears received notice that Plaintiff had  
13 filed a charge of disability discrimination with the Equal  
14 Employment Opportunity Commission ("EEOC") on July 25, 2007.

15           On August 15, 2007, Brignoni sent Sears a medical  
16 certificate stating that Plaintiff could return to work and  
17 "resume his full-time tasks." (Docket No. 29-44.) The same day,  
18 Sears informed Plaintiff that he could return to work. Plaintiff  
19 returned to work on August 16, 2007, and continued working with  
20 the Hyster machine accommodation. That day, González asked  
21 Ricardo Miranda, Plaintiff's supervisor, to assist her in

Civil No. 08-1325 (JAF)

-10-

1 ensuring that Plaintiff satisfactorily performed his work without  
2 creating problems for coworkers or supervisors.

3 On October 5, 2007, an anonymous caller contacted a Sears  
4 ethics hotline to report that Plaintiff frequently disrespected  
5 coworkers and supervisors, instigated arguments, and created  
6 tension and anxiety in the workplace. The caller could not  
7 provide specific examples of such behavior.

8 On October 10, 2007, Plaintiff drafted a statement detailing  
9 an interview he had had with police agents who were investigating  
10 thefts at RDC. Plaintiff implicated certain Sears supervisors and  
11 managers as responsible for the thefts. Plaintiff alleges that  
12 he informed Vega of these facts and allegations on November 8,  
13 2007.

14 On November 8, 2007, Paca called the ethics hotline and  
15 reported that Plaintiff had disrespected him that day and on  
16 three prior occasions; Paca claimed to have made prior reports  
17 without effect. The same day, Paca wrote a report detailing the  
18 incident and the verbal exchange with Plaintiff. Plaintiff denies  
19 Paca's account.

20 Sears terminated Plaintiff on November 9, 2007. Plaintiff  
21 filed a second charge of discrimination with the EEOC on November  
22 13, 2007.

Civil No. 08-1325 (JAF)

- 11 -

Plaintiff filed the present action in federal district court on March 14, 2008. (Docket Nos. 1, 12.) Defendant moved for summary judgment on April 24, 2009. (Docket No. 29.) Plaintiff opposed on May 18, 2009 (Docket No. 40), Defendant replied on May 29, 2009 (Docket No. 49), and Plaintiff surreplied on June 9, 2009 (Docket No. 54).

II.

### Summary Judgment Standard Under Rule 56(c)

We grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if it could be resolved in favor of either party, and "material" if it potentially affects the outcome of the case. Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004). The moving party carries the burden of establishing that there is no genuine issue as to any material fact; however, the burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett,

Civil No. 08-1325 (JAF)

-12-

1                   (1) an initial burden of production, which shifts to the  
2 nonmoving party if satisfied by the moving party; and (2) an  
3 ultimate burden of persuasion, which always remains on the moving  
4 party. Id. at 331.

5                   In evaluating a motion for summary judgment, we must view  
6 the record in the light most favorable to the non-moving party.  
7 Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). However,  
8 the non-moving party "may not rely merely on allegations or  
9 denials in its own pleading; rather, its response must . . . set  
10 out specific facts showing a genuine issue for trial." Fed. R.  
11 Civ. P. 56(e)(2).

12                   **III.**

13                   **Analysis**

14                   **A. ADA Claims**

15                   **1. Disability Discrimination**

16                   Defendants argue, inter alia, that Plaintiff is not a  
17 qualified individual with a disability under the ADA because he  
18 was unable to perform the essential functions of his job, picking  
19 and retrieving stocked merchandise. (Docket No. 30.) The parties  
20 dispute whether "picking and retrieving" merchandise was an  
21 essential function of Plaintiff's job. (See Docket Nos. 30, 40.)

Civil No. 08-1325 (JAF)

-13-

1           The ADA prohibits discrimination against a "qualified  
2 individual with a disability because of the disability of such  
3 individual in regard to . . . discharge . . . and other terms,  
4 conditions, and privileges of employment." 42 U.S.C. § 12112(a).  
5 To establish a claim for an adverse employment action under the  
6 ADA, a plaintiff must prove that he was (1) disabled under the  
7 ADA, but (2) "able to perform, with or without reasonable  
8 accommodation, the essential functions of her job," and (3)  
9 "discharged or adversely affected, in whole or in part, because  
10 of her disability." Orta-Castro v. Merck, Sharp & Dohme Quimica  
11 P.R., Inc., 447 F.3d 105, 111 (1st Cir. 2006).

12           A qualified individual under the ADA is one "able to perform  
13 the essential functions of the position with or without  
14 reasonable accommodation." Ward v. Mass. Health Research Inst.,  
15 Inc., 209 F.3d 29, 33 (1st Cir. 2000). An "essential function"  
16 is a "fundamental job dut[y] of the employment position the  
17 individual with the disability holds or desires." 29 C.F.R. §  
18 1630.2(n)(1). To determine whether a particular job requirement  
19 is an essential function, a court must conduct a fact-intensive  
20 inquiry and consider numerous factors, including (1) the  
21 employer's view of job requirements; (2) written job descriptions  
22 prepared prior to hiring; (3) the length of time spent performing

Civil No. 08-1325 (JAF)

-14-

1       this function; (4) the consequences of not requiring the  
2       function; (5) work experience of past incumbents in the job; and  
3       (6) work experience of current incumbents in similar positions.

4       See C.F.R. § 1630.2(n)(3); see also Ward, 209 F.3d at 34-35. The  
5       employer, who is better positioned to produce the relevant  
6       evidence, bears the burden of demonstrating that a given job  
7       function is essential. See Ward, 209 F.3d at 35 (citations  
8       omitted). “[E]vidence that accommodations were made so that an  
9       employee could avoid a particular task ‘merely shows the job  
10      could be restructured, not that [the function] was non-  
11      essential.’” Phelps v. Optima Health, Inc., 251 F.3d 21, 26 (1st  
12      Cir. 2001) (quoting Basith v. Cook County, 241 F.3d 919, 930 (7th  
13      Cir. 2001)).

14           Defendants have produced a written job description for the  
15      warehouse material handler position, which includes “stock[ing]  
16      and pick[ing] merchandise” on a list of essential job functions.  
17      (Docket No. 29-5.) Vega testified that Sears provided the job  
18      description to all new employees upon hiring, and later if  
19      requested. (Docket No. 35-2.) She further explained that the job  
20      description does not change unless the position is changed. (Id.)  
21      González testified that while at any given time a warehouse  
22      material handler might not be required to perform all of the

Civil No. 08-1325 (JAF)

-15-

1 listed functions, he or she could be called upon at any time to  
2 perform those functions depending on Sears's needs. (Docket Nos.  
3 35-5, 35-6.) Accordingly, Sears required that employees in that  
4 position be capable of performing all of the described functions.

5 (See id.)

6 Plaintiff testified that, prior to his treatment and since  
7 he began working in the warehouse in 2003, his job consisted of  
8 picking and retrieving merchandise using a cherry picker and  
9 manually loading pallets. (Docket No. 35-4.) In May 2006,  
10 Plaintiff submitted a form completed by Bravo requesting a  
11 reasonable accommodation involving a reassignment to another  
12 position that did not require him to lift heavy objects or be  
13 exposed to heights. (Docket No. 29-20.) Plaintiff does not  
14 dispute that he was unable to perform the task of picking and  
15 retrieving merchandise once he began treatment. Instead, Sears  
16 allowed him to stock merchandise using a Hyster machine which  
17 lifts pallets up and places them on the upper shelves of the  
18 warehouse while the operator remains seated. (Docket No. 35-4.)

19 Plaintiff does not suggest what he believes are the  
20 essential functions of his position, offer any evidence to rebut  
21 Sears' evidence demonstrating that picking is an essential  
22 function, or argue that he was capable, with or without

Civil No. 08-1325 (JAF)

-16-

1 accommodation, of picking and retrieving merchandise. Plaintiff's  
2 arguments that Defendant's evidence is contradictory are  
3 unavailing. (See Docket No. 40.) Beyond these assertions,  
4 Plaintiff claims only that, because Sears allowed him to stock  
5 merchandise rather than pick and retrieve merchandise during his  
6 treatment, his job could be restructured. (See id.) However, the  
7 First Circuit rejected this argument in Phelps. See 251 F.3d at  
8 26. The fact that Sears restructured Plaintiff's job to  
9 accommodate his treatment does not prove that picking and  
10 retrieving merchandise was not an essential function. Cf. id.  
11 Without any other evidence, Plaintiff has failed to show a  
12 triable issue of fact regarding his essential job functions.  
13 Accordingly, Plaintiff is not a qualified individual under the  
14 ADA, see Ward, 209 F.3d at 33, and we must grant summary judgment  
15 for Defendants on Plaintiff's ADA disability discrimination  
16 claims. As we grant summary judgment for Defendants on this  
17 ground, we need not address their other arguments regarding  
18 disability discrimination.

19       **2. Failure to Accommodate**

20       Defendants argue that they are entitled to summary judgment  
21 on Plaintiff's failure to accommodate claim because Sears in fact  
22 provided Plaintiff with the accommodation he requested. (Docket

Civil No. 08-1325 (JAF)

- 17 -

No. 30.) Plaintiff does not dispute Defendants' motion for summary judgment on this issue and, in fact, concedes that he received a reasonable accommodation during his treatment. (See Docket No. 40.) We, therefore, grant summary judgment in favor of Defendants on Plaintiff's failure to accommodate claim.

### 3. Retaliation

The ADA prohibits retaliation "against any individual because such individual has opposed any act or practice made unlawful by this chapter." 42 U.S.C. § 12203(a). "An ADA plaintiff may assert a claim for retaliation even if [he] fails to succeed on a disability claim." Freadman v. Metro. Prop. & Cas. Ins. Co., 484 F.3d 91, 106 (1st Cir. 2007). In the absence of direct evidence, as here, a plaintiff must make a prima facie showing of retaliation by showing that (1) he engaged in protected conduct, (2) he suffered an adverse employment action, and (3) there was a causal connection between the protected conduct and the adverse employment action. See Wright v. CompUSA, Inc., 352 F.3d 472, 478 (1st Cir. 2003). In some circumstances, "the causation element may be established by evidence that there was a temporal proximity between" the protected conduct and the

Civil No. 08-1325 (JAF)

-18-

1 employment action. Quiles-Quiles v. Henderson, 439 F.3d 1, 8 (1st  
2 Cir. 2007).

3 Once a plaintiff establishes the prima-facie case, "the  
4 burden shifts to the employer 'to articulate a legitimate,  
5 nondiscriminatory reason for its employment decision.'" Wright,  
6 352 F.3d at 478 (quoting Mesnick v. Gen. Elec. Co., 950 F.2d  
7 816, 827 (1st Cir. 1991)). If the employer does so, the burden  
8 shifts back to the plaintiff to show that the proffered reason  
9 is mere pretext for retaliation. Id. "[W]here a plaintiff . . .  
10 makes out a prima facie case and the issue becomes whether the  
11 employer's stated nondiscriminatory reason is a pretext for  
12 discrimination, courts must be particularly cautious about  
13 granting the employer's motion for summary judgment." Billings  
14 v. Town of Grafton, 515 F.3d 39, 55-56 (1st Cir. 2008) (quoting  
15 Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 161 (1st Cir.  
16 1998)).

17 Requesting an accommodation constitutes protected conduct  
18 under the ADA's retaliation provision. Freadman, 484 F.3d at 106.  
19 It is undisputed that Sears suspended and later discharged  
20 Plaintiff, and that these constituted adverse employment actions.  
21 We consider the suspension and the termination in turn.

Civil No. 08-1325 (JAF)

-19-

1           **a. Suspension**

2           Defendants argue that Plaintiff has failed to show a causal  
3 connection between his protected conduct and the suspension.  
4 (Docket No. 30.) Plaintiff submitted HCPCs requesting reasonable  
5 accommodations on May 8, 2007, and July 10, 2007. Sears suspended  
6 Plaintiff shortly thereafter on July 24, 2007. Moreover, it is  
7 undisputed that Plaintiff's supervisors informed him that he was  
8 being suspended so that they could clarify information in his  
9 reasonable accommodation request. We find that the temporal  
10 proximity between Plaintiff's requests, coupled with this  
11 admission by his supervisors, is sufficient evidence for a  
12 reasonable jury to find a causal connection between the requests  
13 and the suspension.

14           Defendants do not articulate a justification for Plaintiff's  
15 suspension in response to his claim for retaliation. (See Docket  
16 Nos. 30, 50.) Nonetheless, we consider the reason articulated by  
17 Defendants in response to Plaintiff's disability discrimination  
18 claims. (See Docket No. 30.) Defendants state that they suspended  
19 Plaintiff in order to evaluate whether his emotional condition  
20 made him a threat to others due to the irritability and  
21 "emotional liability" Bravo noted on the May 2007 HCPC, and

Civil No. 08-1325 (JAF)

-20-

1 because of Bravo's affirmative notations on the HCPCs related to  
2 the risk assessment question. (Docket No. 30; see Docket Nos. 29-  
3 20, 29-28.)

4 Drawing all inferences in Plaintiff's favor, however, we  
5 believe a jury could find this assertion to be pretext. First,  
6 the HCPC form links the risk assessment question to an attached  
7 description of the patient's present position. (See id.) In other  
8 words, the form appears to ask only whether the individual poses  
9 a risk in his current position, and Bravo's notations suggest  
10 that Plaintiff would not pose the potential risk with the  
11 accommodations requested. For example, Plaintiff would not be at  
12 risk for falling if he was not exposed to heights.

13 Second, as Plaintiff notes, Defendants did not suspend him  
14 after he submitted the May 2006 form containing Bravo's  
15 affirmative response to the risk assessment question (Docket No.  
16 29-20), nor did Defendants choose to suspend him after Bravo  
17 wrote that he could be a risk due to "emotional liability" on the  
18 May 2007 form (Docket No. 29-28). It was not until after Bravo  
19 clarified that Plaintiff was not a risk to others on the July  
20 2007 form (Docket No. 29-32) that Defendants suspended Plaintiff  
21 to allegedly investigate the risk posed by his emotional state.  
22 We agree with Plaintiff that these discrepancies raise a triable

Civil No. 08-1325 (JAF)

-21-

1 issue of fact as to whether his suspension was motivated by  
2 retaliation. See Billings, 515 F.3d at 55-56 ("One way to show  
3 pretext is through 'such weaknesses, implausibilities,  
4 inconsistencies, incoherencies, or contradictions in the  
5 employer's proffered legitimate reasons for its action that a  
6 reasonable factfinder could rationally find them unworthy of  
7 credence . . . .'" (quoting Hodgens, 144 F.3d at 168)).

8           **b. Discharge**

9           Defendants argue that Plaintiff has failed to point to any  
10 evidence suggesting a causal connection between his EEOC charge  
11 and his discharge. (Docket No. 30.)

12           Defendants became aware that Plaintiff had filed the EEOC  
13 charge on August 15, 2007, but the discharge did not occur until  
14 nearly four months later, on November 8, 2007. Plaintiff, thus,  
15 cannot rely on temporal proximity to create an inference of  
16 causation, see Calero-Cerezo, 355 F.3d at 25, and he has  
17 suggested no other theories supporting such an inference.

18           Plaintiff seems to assert that the fact that most of the  
19 reprimands he received took place after his first request for  
20 reasonable accommodation shows that the reprimands and the  
21 ultimate discharge were all motivated by retaliatory animus. (See

Civil No. 08-1325 (JAF)

-22-

Docket No. 40.) While it is true that "[e]vidence of discriminatory or disparate treatment in the time period between the protected activity and the adverse employment action can . . . show a causal connection," Chungchi Che v. Mass. Bay Trans. Auth., 342 F.3d 31, 38 (1st Cir. 2003), Plaintiff fails to point to any evidence that the reprimands reflect some discriminatory animus or disparate treatment. Without more, we cannot find that there was a causal nexus between Plaintiff's requests for accommodation or EEOC charge and his discharge.

**B. Law 44**

Because Law 44 is coterminous with the ADA's discrimination and reasonable accommodation provisions, our reasoning above applies to Plaintiff's claims for disability discrimination under Law 44, and we grant summary judgment for Defendants on these claims. See Ruiz Rivera v. Pfizer Pharms., LLC, 521 F.3d 76, 87 (1st Cir. 2008).

**C. Law 115**

Law 115 provides that an employer may not discriminate against an employee for offering or attempting to offer "any testimony, expression or information before a legislative, administrative or judicial forum." 29 L.P.R.A. § 194a. Law 115

Civil No. 08-1325 (JAF)

-23-

1 does not prohibit retaliation in response to internal complaints,  
2 only offerings to a judicial forum. Id.; Hoyos v. Telecorp  
3 Commc'ns., 405 F. Supp. 2d 199, 207 (D.P.R. 2005). To prove  
4 liability under Law 115, an employee must first establish a  
5 prima-facie case by showing that she participated in a protected  
6 activity and was subsequently discharged. 29 L.P.R.A. § 194a(c).  
7 Next, the employer must offer a legitimate, non-discriminatory  
8 reason for the discharge. Id. Finally, the plaintiff may prevail  
9 by demonstrating that the alleged reason is a "mere pretext for  
10 the discharge." Id.

11 Defendants do not dispute that filing a charge with the  
12 EEOC, filing a complaint with PROSHA, and offering testimony to  
13 the police in a criminal investigation constitute protected  
14 activity. It is further undisputed that Defendants discharged  
15 Plaintiff. These facts establish Plaintiff's prima-facie case.  
16 See 29 L.P.R.A. § 194a(c).

17 Defendants have stated that Plaintiff's discharge was a  
18 result of repeated reprimands he received for acts of  
19 insubordination and threats towards his supervisors and  
20 coworkers. To show pretext, Plaintiff has introduced evidence  
21 challenging the truth of the reprimands and the factual scenarios  
22 involved in the alleged incidents.

Civil No. 08-1325 (JAF)

-24-

1 Plaintiff has failed to show that the reprimands constituted  
2 pretext for retaliation on the basis of his PROSHA complaints  
3 because the evidence he has introduced does not demonstrate  
4 causation. (See Docket Nos. 38, 40.) Plaintiff apparently filed  
5 two complaints with PROSHA regarding safety concerns at Sears,  
6 but the letters from PROSHA to Sears and to Plaintiff show that  
7 Plaintiff's identity as a complainant was kept confidential.  
8 Plaintiff, therefore, cannot show that Defendants knew he had  
9 filed the complaints.

10 Plaintiff has also failed to show causation arising from his  
11 EEOC charge. Defendants became aware Plaintiff had filed the  
12 charge on August 14, 2007, but he was not discharged until nearly  
13 four months later. Plaintiff has not pointed to any evidence  
14 suggesting a causal connection between these events, or that the  
15 discharge was motivated by his filing of the charge.

16 On the other hand, Plaintiff has introduced evidence that he  
17 provided testimony to the police in a criminal investigation less  
18 than one month before his termination, and that he informed Vega  
19 of his allegations the day before Defendants discharged him. We  
20 find that, if proven at trial, a reasonable jury could determine  
21 that this very close proximity, combined with Plaintiff's

Civil No. 08-1325 (JAF)

-25-

1 challenges to Defendant's proffered reason for the discharge,  
2 demonstrate pretext for retaliation.

3       **D. Law 80**

4           Law 80, Puerto Rico's wrongful termination statute, entitles  
5 an employee discharged from employment without just cause to  
6 severance pay from his former employer. 29 L.P.R.A. § 185a. Under  
7 Law 80, an employee bears the initial burden of alleging  
8 unjustified dismissal and proving actual dismissal. Álvarez  
9 Fonseca v. Pepsi Cola of P.R., 152 F.3d 17, 28 (1st Cir. 1998).  
10 Once the employee does so, the burden shifts to the employer to  
11 prove that it discharged the employee for just cause. Id.

12           It is undisputed that Defendants terminated Plaintiff from  
13 his employment with Sears. Defendants submit evidence of multiple  
14 examples of occasions where Plaintiff received reprimands for  
15 insubordination and inappropriate conduct in the workplace.  
16 Plaintiff, in response, proffers testimony and evidence  
17 challenging most of these reprimands as unwarranted or falsified,  
18 including the final incident that allegedly precipitated his  
19 termination. There remain triable issues of material fact  
20 regarding Plaintiff's Law 80 claims; accordingly, summary  
21 judgment on this claim is unwarranted.

Civil No. 08-1325 (JAF)

-26-

1

**IV.**

2

**Conclusion**

3           For the reasons stated herein, we hereby **GRANT** Defendant's  
4 motion for summary judgment **IN PART** and **DENY** it **IN PART** (Docket  
5 No. 29). We **DISMISS** Plaintiff's claims for disability  
6 discrimination, failure to accommodate, and retaliatory discharge  
7 under the ADA, his Law 44 claims, and his Law 115 claims relating  
8 to his EEOC charge and PROSHA complaints. Remaining are  
9 Plaintiff's claims for retaliatory suspension under the ADA,  
10 retaliatory discharge under Law 115 arising from his testimony  
11 to the Puerto Rico police, and wrongful termination under Law 80.  
12 The parties are strongly encouraged to exhaust all settlement  
13 possibilities before proceeding to trial.

14

**IT IS SO ORDERED.**

15

San Juan, Puerto Rico, this 10<sup>th</sup> day of August, 2009.

16

s/José Antonio Fusté  
JOSE ANTONIO FUSTE  
Chief U.S. District Judge

17

18